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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-692

WILLIAM VITO DENTAMARO AND PHILLIP WAGGENHEIM, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 72-693

DAVID ROBERT IACOVETTI, PETITIONER

v.

UNITED STATES OF AMERICA

No. 72-5659

ROBERT CARDILLO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals is reported at 466 F. 2d 1147.

JURISDICTION

The judgment of the court of appeals was entered on August 31, 1972. A petition for rehearing was denied on October 5, 1972. The petition for a writ of certiorari of petitioner Cardillo was filed on November 3, 1972 and that of petitioners Dentamaro and Waggenheim on November 4, 1972. Petitioner Iacovetti's petition was not filed until November 6, 1972 and is out-of-time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners were placed in double jeopardy by being brought to trial a second time, after their motions for severance at their first trial had been granted.

2. Whether error was committed as to petitioner Iacovetti by the admission of testimony of a conversation concerning the division of proceeds from the sale of stolen securities, when the conversation occurred a few days after the proceeds were divided.

3. Whether evidence that petitioner Iacovetti knowingly agreed to a plan for the disposition of stolen securities which necessarily involved their transportation in interstate commerce, was sufficient to sustain his conviction for conspiracy to transport stolen securities in interstate commerce.

STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petition-

ers Dentamaro, Waggenheim and Iacovetti were convicted on two counts and petitioner Cardillo on three counts of conspiracy and substantive violations of 18 U.S.C. 2314 and 2315 involving the receipt, transportation and sale of stolen securities.[1] Cardillo was sentenced to consecutive prison terms of five years on count 1 (conspiracy) and ten years on count 2 and to a concurrent prison term of ten years on count 3; Dentamaro and Waggenheim were each sentenced to consecutive prison terms of four years and two years, respectively, on count 1 and eight years on count 2; Iacovetti was sentenced to consecutive prison terms of four years on count 1 and six years on count 2.

1. The evidence showed that in March 1969, Vincent Teresa, a participant in the illegal scheme who became the government's chief witness, met with the four petitioners in Miami, Florida. Teresa asked Iacovetti whether he knew anyone who could pass stolen bonds and Iacovetti replied that he would check with an acquaintance in a brokerage firm. A week later, when all five men met again, Iacovetti introduced them to Barry Lipsky, a stock broker willing to pass stolen securities (R. 525–533).[2]

After Dentamaro and Waggenheim left, Cardillo and Teresa instructed Lipsky to open an account under an

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[1] A co-defendant, Anthony DeRosa, was tried with petitioners and convicted on three counts; he subsequently dismissed his appeal. A fifth defendant in the case, Barry Lipsky, entered a guilty plea after the trial of the other defendants and has not appealed.

[2] "R." refers to volumes I and II of the Record on Appeal. The designation "S.R." refers to the Supplemental Record. "S.R. 2" is the 2nd Supplemental Record filed.

assumed name, through which he could cash the bonds they would give him. Iacovetti listened to this entire conversation (R. 534–535). Later, Cardillo, Dentamaro, Waggenheim and Teresa went to a Miami hotel where they met Anthony DeRosa and a man named "Frankie", who in February 1969 had agreed to supply them with stolen securities (R. 537–540). Frankie told them he would check on the availability of stolen stock. While everyone listened, he placed a call to someone named "Jerry", who at Frankie's request flew down the next day from New York with stock (R. 542–543, 551–552).

On his arrival, Jerry met with DeRosa, Dentamaro, Waggenheim, Teresa and Frankie and told them that the stock had been stolen in a mail theft a few days earlier in New York.[3] Teresa, Dentamaro and Waggenheim took some securities to Cardillo, who looked through them and selected American Express stock for conversion into cash (R. 554–556, 559–562, 564–565). Cardillo then telephoned Lipsky and arranged for Teresa to sign the papers necessary to open an account (R. 565, 568–569). Teresa endorsed the stock in the name of its registered owner and gave it to Lipsky. Later that day, Teresa reported to Iacovetti that they would be paid for the stock shortly (R. 505–508, 569, 570).

In April, Cardillo telephoned Teresa and told him that the payment was ready. Teresa went to the bank with Lipsky, cashed two checks totalling approximate-

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[3] There was corroborative evidence at trial that the securities had been stolen from the mails in New York in March 1969 (S.R. 500–505, 508, 580, 585).

ly $43,800, and went to meet Cardillo, DeRosa, Dentamaro and Waggenheim. The five men divided the money equally, with shares being set aside for Iacovetti and Lipsky, who were not present (R. 571–572, 575–579). A few days later Teresa talked to Iacovetti by phone and asked if he had received his share of the proceeds (R. 580).

2. During a recess in the testimony of Vincent Teresa at the first trial in this case in December 1970, petitioner Waggenheim asked that "Jencks" material be supplied to the defense prior to cross-examination (S.R. 307). The court consented and the transcript of Teresa's grand jury testimony, absent certain pages which the court held did not have to be provided, was given to the defendants (R. 326, 329). The excluded material showed a prior relationship between Teresa and Iacovetti's attorney with respect to a stolen check. The next day, the government voluntarily gave the excluded material to the defense, so that the defense would be forewarned not to go into it at trial. Upon receiving this information, petitioners (except Iacovetti) moved for a severance or a mistrial on the ground that they would now be prohibited from fully cross-examining Teresa (R. 334, 337, 339, 341). The court at first denied the motions (R. 341), but then agreed to further consideration. Iacovetti requested a severance and a mistrial so that he could retain other counsel (R. 344–345, 372–375). All petitioners expressed the fear that the jury would draw an adverse inference if counsel for Iacovetti was made the subject of an accusation by the government's chief witness (R. 337–338, 348, 353, 368–369). Counsel for Iacovetti stated

(without contradiction by other counsel) that no one, except possibly the court, would be inconvenienced if a new trial was ordered (R. 378–380).

The district judge ruled that "it is absolutely impossible to try Mr. Iacovetti in this case and to require Mr. Kessler to continue as counsel for Mr. Iacovetti because of all of these situations that have developed and the possibility of future developments * * *" (R. 389). He then granted defendant Lipsky's motion for a severance, directed that Lipsky's trial proceed and stated that the others would be tried at a later date (R. 389). The government asked the court to reconsider because it preferred to try the other defendants first (R. 391–396). Lipsky's counsel also expressed concern because his client had been seen by the jury with the other defendants (R. 397). After a recess, counsel for Lipsky moved for a mistrial on the ground that the jury could no longer render a fair decision in view of all that had transpired. The government did not oppose the motion and the court granted it (R. 404A–B).

Before the second trial, petitioners moved to dismiss the indictments, claiming double jeopardy. The district court denied the motion, pointing out that petitioners had stated that to proceed further would be prejudicial and adding "It was this Court's feeling then and this Court's feeling now that the rulings were necessary to avoid a miscarriage of justice" (R. 444–445).

ARGUMENT

1. Relying principally upon *United States* v. *Jorn*, 400 U.S. 470, and the decision of the original panel in

United States v. *Walden*, 448 F. 2d 925 (C.A. 4), reversed upon reconsideration *en banc* by an equally divided court, 458 F. 2d 36, certiorari denied *sub nom. Ard* v. *United States*, October 10, 1972 (No. 71-6798, O.T. 1972), petitioners claim that the district court violated their rights against double jeopardy by trying them again after the mistrial.

It is clear from the record of the first trial that severances were granted only after petitioners voluntarily requested them and insisted that they were necessary to avoid prejudice to their defense. Since the severances necessarily entailed a trial before a new jury, petitioners received at their second trial precisely what they had sought at their first. They were "not * * * deprived of [their] option to go to the first jury and, perhaps, end the dispute then and there with an acquittal." *United States* v. *Jorn*, 400 U.S. 470, 484 (1971). The cases from *United States* v. *Perez*, 9 Wheat. 579 (1824) to *United States* v. *Jorn*, *supra*, which require a showing of "manifest necessity" to abort the first trial, apply only where the trial is "aborted prior to verdict without the defendant's consent." *Jorn*, *supra*, at 480. The Court in *Jorn* specifically stated that except in usual circumstances, a motion for a mistrial removes any barrier to reprosecution. *Jorn*, *supra*, at 485.

Petitioners attempt to minimize their requests for a mistrial by claiming that they were only "mouthing" their motions, within the meaning of *United States* v. *Walden*, 448 F. 2d 925. Even prior to its reversal by the Fourth Circuit *en banc*, however, *Walden* was not helpful to petitioners. In *Walden*, the trial

court first suggested that the defendants move for a mistrial and then declared one, notwithstanding the express desire of some defendants to proceed with the trial and a motion to sever from those being granted a mistrial. The original panel there had found that the trial court had destroyed any option on the part of the defendants and that the motions for severance were thus not voluntary. 448 F. 2d at 929–930. In the instant case, the trial court granted the severances only after petitioners repeatedly moved for relief.[4]

2. Petitioner Iacovetti's claim that it was error to admit testimony of Teresa's conversation with him concerning the sale proceeds was properly rejected by the court of appeals. In addition to the considerations discussed the court in its opinion below (Iacovetti Pet. App. 14), we note that petitioner did not object at trial to the admission of the testimony. An objection to a subsequent question was made by another defendant, but the admission of Teresa's testimony regarding the conversation with Iacovetti was never challenged (R. 580–586).

3. Petitioner Iacovetti, relying upon *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2), alleges that the evidence was insufficient to sustain his conviction for conspiracy to transport or cause to be transported stolen securities in interstate commerce. He alleges that since his part in the conspiracy was peripheral,

[4] Petitioner Iacovetti's suggestion that the severances were granted to give the government an unfair advantage is wholly at odds with the record. (See *supra*, pp. 5–6). Petitioner Cardillo's claim that the government acted improperly in not revealing the excluded material earlier was fully answered by the opinion of the court of appeals below (Cardillo Pet. App. 11–12).

he must be shown to have had some knowledge of the interstate movement of the securities pursuant to the criminal conspiracy. Petitioner does not dispute that he knew the securities were stolen. In rejecting this contention, the court of appeals held (Iacovetti Pet. App. 15–16):

> However, all participants in this conspiracy, including Iacovetti, had an all encompassing disregard as to whether the stolen securities had an interstate or an intrastate character. They were only concerned about their sale. There was no showing that the conspiracy was part of a plan to sell stolen securities which were only of a local nature.
>
> Where the plan, as in this case, is to sell stolen securities, regardless of whether they have an interstate or intrastate character, we believe that the scope of the conspiracy can be found broad enough to imply intent to commit a federal crime such as in Nassif v. United States, 8 Cir., 1966, 370 F. 2d 147, cited with approval in United States v. McGann, 5 Cir., 1970, 431 F. 2d 1104, 1108, cert. denied 401 U.S. 919.

The Second Circuit's decision in *Crimmins* would not require a contrary result. That case has been held to stand for the limited proposition that "a peripheral conspirator, having no knowledge of the operations of the conspiracy as a whole, cannot be convicted without proof indicating some knowledge on his part of the interstate features of the venture * * *." *United States* v. *Corallo,* 413 F. 2d 1306, 1326 (C.A. 2). Where, however, the participant is directly involved in carrying out "the principal object of the conspiracy * * * the proofs are held to be sufficient if

the evidence warrants an inference that the particular defendant directly agreed to a scheme in which it was known that the likelihood of use of interstate [facilities] * * * was great." *United States* v. *Corallo, supra,* 413 F. 2d at 1327. The "principal object" of this conspiracy" was the disposition of stolen securities. Petitioner was directly involved in obtaining the medium for the disposition—a stockbroker employed by a national brokerage firm at their Miami, Florida, branch office. (R. 793; Tr. 333). Since the disposition of securities through such a brokerage office foreseeably involves the transportation of the securities in interstate commerce, and did so in this case (R. 812; Tr. 352), the jury could infer, in the absence of contrary evidence, that petitioner must have "had some knowledge" that the stolen securities would, in the words of the indictment, be "transport[ed] and caus[ed] to be transported in interstate commerce." [5]

Although there is a disagreement among the courts of appeals as to whether proof of knowledge of the interstate movement of the stolen goods is an essential element of the offense of conspiracy,[6] this case is not appropriate one in which to resolve the con-

[5] Petitioner Iacovetti's claim that knowledge of the interstate transportation is necessary for a conviction on the substantive offense is without merit. The cases clearly hold otherwise. See, *e.g.*, *United States* v. *Strauss*, 443 F. 2d 986 (C.A. 1); *United States* v. *Mingoia*, 424 F. 2d 710 (C.A. 2); *United States* v. *Powers*, 437 F. 2d 1160 (C.A. 9).

[6] Compare *United States* v. *Roselli*, 432 F. 2d 879, 892 (C.A. 9), certiorari denied, 401 U.S. 924, with *United States* v. *Crimmins*, 123 F. 2d 271 (C.A. 2), and *United States* v. *Vilhotti*,

flict. As the court of appeals here held in denying rehearing (Iacovetti App. 17–19), the evidence of Iacovetti's knowledge of the interstate character of the conspiracy was sufficient.

CONCLUSION

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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DECEMBER 1972.

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452 F. 2d 1186 (C.A. 2), certiorari denied, 406 U.S. 947. In *United States* v. *Roselli*, *supra*, the court of appeals held, contrary to the holdings in *Crimmins* and *Vilhotti*, that the interstate movement of stolen goods is merely a jurisdictional element and knowledge on the part of a participant in a conspiracy need not be proved. The court said (432 F. 2d at 891–892):

"The essence of the offense under the general conspiracy statute, 18 U.S.C. § 371, is an agreement by two or more persons to commit the substantive crime. In virtually all cases the meeting of minds is established simply by inference from a concert of action that produces the forbidden result. There is no apparent reason for requiring not only proof of a concert of action that includes all elements of the substantive offense, but also proof of knowledge of the jurisdictional element that is not required for conviction of the substantive offense. Such knowledge is as irrelevant to the purposes of the general conspiracy statute as it is to the purposes of the substantive statutes."